IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et. al.,	§	CIVIL ACTION NO. 01-CV-3624
	§	AND CONSOLIDATED CASES
Plaintiffs,	§	
v.	§	
	§	
ENRON CORPORATION, et al.	§	
	§	
Defendants.	§	

PAMELA M. TITTLE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
	§	CIVIL ACTION NO: H-01-3913
v.	§	AND CONSOLIDATED CASES
	§	
ENRON CORP., an Oregon	§	
Corporation, et al.,	§	
	§	
Defendants.	§	

OUTSIDE DIRECTORS' MEMORANDUM
CONCERNING DISCOVERY OF EXAMINER TRANSCRIPTS

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OUTSIDE DIRECTORS' MEMORANDUM
CONCERNING DISCOVERY OF EXAMINER TRANSCRIPTS

TO THE HONORABLE MELINDA HARMON:

Pending before the Court is the Regents' Motion to Compel Production of Examiner Transcripts.[1] Fundamentally, the question raised by this motion is:

> Can this Court fairly administer and try these consolidated cases if only some parties have access to a universe of highly relevant, otherwise discoverable information; namely, sworn testimony provided to the Enron Bankruptcy Examiner?

In most cases, the former testimony of witnesses is routinely produced and discussed at trial. *See* Fed. R. Civ. P. 26(b)(3) (allowing parties and non-parties to discover as of right their own witness statements). This is so common that there are specific Federal Rules of Evidence that address how former testimony and prior statements of a witness may be used at trial. *See* Fed. R. Evid. 613 and 801(d).

In this case, however, the Financial Institutions[2] contend that the former testimony of their employees should not be discovered because the Examiner agreed in advance to maintain it in confidence. That a party has agreed to keep a relevant witness statement confidential does not mean that this Court cannot order it produced – any more than an agreement by two parties to keep a contract confidential means that it cannot be produced in a subsequent suit on the contract. Testimony is evidence, pure and simple. Here, it is highly relevant evidence provided by persons

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[1] *See Newby* Instrument No. 1803.

[2] The term "Financial Institutions" refers to the following defendants that opposed the Regents' Motion to Compel: Bank of America Corp., Bank of America Securities LLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC World Markets PLC, Credit Suisse First Boston LLC, Credit Suisse First Boston (USA) Inc., Pershing LLC, Lehman Brothers Holdings Inc., Lehman Brothers Inc., Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Inc. *See Newby* Instrument No. 1852.

with knowledge of what happened at Enron and the events that led up to its collapse. This testimony is not only highly relevant, it may be difficult to replicate – because witnesses who have testified before the Examiner have since (and may in the future) become unavailable as a result of ongoing criminal proceedings.

This case cannot be fairly administered and tried if only some parties (Enron, the Creditors' Committee and their adversaries[3]) have access to the former testimony of key witnesses. Are only they to have the right to confront witnesses with prior statements? *See* Fed. R. Evid. 801(d)(2). Are only they to have the right to offer admissions against their party opponents? *Id.* What about the rights of the other parties to confront the witnesses against them? It simply should not be the case that witness credibility will be tested only if doing so will help Enron, its creditors and their adversaries[4] – but no one else. Such a skewed presentation of the evidence, resulting from a "stacked

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[3] All of the Financial Institution Defendants in *Newby* are defendants in *Enron Corp. v. Citigroup, et al.* Adv. No. 03-09266 (AJG) (Bankr. S.D.N.Y.) (the "*Enron Adversary Proceeding*"). Many of the Enron Officer Defendants (including Messrs. Lay, Skilling, Buy, Causey, Fastow, Glisan and Kopper) are defendants in *Official Unsecured Creditors' Committee of Enron Corp. v. Fastow, et al.*, C.A. No. H-04-91 (S.D. Tex.) (the "Creditors' Committee" action) that is now before this court. The Creditors' Committee has also either sued or obtained authority to sue Arthur Andersen, LLP, Vinson & Elkins, LLP and Andrews Kurth, LLP. Milbank, Tweed, Hadley, and McCloy, L.L.P, a defendant recently sued by the Regents in a *Newby*-coordinated action, is counsel to the Official Unsecured Creditors' Committee, so it presumably has access to many (if not all) of the Examiner transcripts, as well.

[4] Although the issue has yet to arise, it is important to note that nothing in Judge Gonzalez's Order prohibits the full use of the Examiner transcripts by Enron in the *Enron Adversary Proceeding*. *See* Exhibit "A" (prohibiting disclosure of the transcripts "in the consolidated ***securities litigation*** known as *Newby v. Enron Corp.*"). Enron has had access to the Examiner transcripts for months and used them to assist it in preparing its adversary complaint against the Financial Institutions. Nor does anything in this Order prohibit the Creditors' Committee from using the transcripts in its action, and it likewise has used them in the prosecution of its case thus far.

Given that the plaintiffs in those cases have and are using the transcripts, it is difficult to conceive of an order denying the defendants in those cases full access to them as well. If access is granted, but only to the defendants in the *Enron* Adversary Proceeding and *Creditors' Committee*

deck" approach to discovery, is fundamentally inconsistent with both the Federal Rules and basic due process.

Accordingly, for the reasons stated below, the Outside Director Defendants submit that the Court should enter an order providing that all parties may have access to the Examiner transcripts.

I. Undisputed Facts

The following undisputed facts are critical to an assessment of the right of the Outside Directors (and other parties) to obtain copies of the Examiner transcripts:

- No discovery is being sought from either of the Enron Examiners.
  - Instead, the discovery requests at issue have been served on parties to this case who have custody or control over their own transcripts.
- Enron has copies of all of the Examiner transcripts.
  - Enron is a party to the *Tittle* case and, as such, may be compelled to produce documents within its custody or control, such as the Examiner transcripts.
  - Enron is also a Plaintiff in the *Enron Adversary Proceeding* pending before Judge Gonzalez, so parties to that action (i.e. the Financial Institutions) may obtain discovery of these materials in that case.
- The Creditors' Committee has copies of all of the Examiner transcripts.
  - The Creditors' Committee is a party to the removed Montgomery County Action that is pending before this Court, so parties to that action (i.e. certain former Enron officers and professional advisory firms) may obtain discovery

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action, the only parties in *Newby* who will not have access to the transcripts are the Outside Directors, the Regents and a handful of Enron officer defendants who have not been sued by Enron or the Creditors' Committee.

of the transcripts in that case.

- An Order entered by the Honorable Arthur J. Gonzalez prohibits the disclosure of the Examiner transcripts solely in the *Newby* case. *See* Order at 2 ("all transcripts of depositions, sworn private statements or other interviews provided to the Examiners . . . are protected from disclosure ***in the consolidated private securities litigation*** known as *Newby v. Enron Corp.*, et. al.")(emphasis added), attached hereto as Exhibit "A."
- No Order, however, prohibits Enron or the Creditors' Committee from using the Examiner transcripts in their respective cases[5] – nor is there any order that prohibits the discovery or use of these materials in the *Tittle* case.

II. What Is Actually At Issue?

The Examiner Transcripts are more than 200 sworn depositions[6] provided to Enron's Examiner, Neal Batson, or his counsel, Alston & Bird. These depositions were taken in the course of Mr. Batson's $100 million investigation of Enron's use of Special Purpose Entities. That investigation ultimately resulted in the publication of four, multi-thousand page reports containing

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[5] Because it may assist this Court in understanding the ruling of the Bankruptcy Court, we have attached a copy of the transcript of the hearing that led to the entry of the Bankruptcy Court's Order. At that hearing, the Financial Institutions were not contending that Enron and the Creditors' Committee were precluded from using the Examiner Transcripts to advance their own lawsuits. *See* Transcript of Hearing at 32-33 (counsel for Creditors' Committee and Enron clarifying that "the financial institutions are not seeking any relief as to the committee's ability to use the sworn statements. . . . The pending motion does not seek any relief against the debtors or any attempt to restrict the debtors' use of these statements."), attached hereto as Exhibit "B."

[6] We use the term "deposition" to encompass the variety of sworn, transcribed interviews obtained by the Examiner. From his reports, it appears that these include, at least, formal depositions conducted pursuant to Bankruptcy Rule 2004 and sworn interviews, conducted in the format of a deposition but not pursuant to subpoena or the Bankruptcy Rules.

Mr. Batson's view of what happened at Enron. The Examiner Transcripts are "prior statements of a witness," pursuant to Fed. R. Evid. 613 and 801(d)(1). They are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26. Indeed, though the Court need not decide this issue now, the former testimony contained in the Examiner transcripts may well be admissible in evidence at trial for certain purposes. Fed. R. Civ. P. 801(d)(1) ("prior statement by a witness") and 801(d)(2) ("admission by a party opponent").

This evidence cannot be replicated by the parties. We repeat: Because of the passage of time, the intervention of criminal and regulatory matters, and circumstances as commonplace as the natural fading of recollections, there is no way the parties to the *Newby* and *Tittle* cases can replicate or recover all of this highly relevant evidence. For example, one witness from Merrill Lynch who provided testimony and/or interviews to the Examiner concerning the Nigerian Barge transaction was subsequently indicted for perjuring himself before the Examiner. *See* Superseding Indictment of Messrs. Bayly, Boyle, Brown, Fuhs, Furst, and Ms. Kahanek at ¶¶ 27-29, attached hereto as Exhibit "C." On information and belief, other witnesses who provided testimony to the Examiner have separately received target letters from the Department of Justice. All of these witnesses are now unavailable, pending their criminal trials or the decision whether they will be prosecuted. Their testimony to the Examiner is therefore the only evidence available to the parties about what these witnesses knew or have said.

Plainly, the transcripts of the Examiners' witness interviews are relevant and discoverable information. The Financial Institutions have not contended they are not.[7] Accordingly, any order

[7] In fact, the Financial Institutions have served Requests for Production on both Andersen and Vinson & Elkins LLP ("V&E") seeking discovery of their statements to the Examiner. *See* Financial Institutions Requests to Andersen, Request No. 42 & Interrogatory Nos. 5-6, attached

prohibiting disclosure may only be entered if some other, extraordinary basis justifies the suppression of this highly relevant evidence.

III. What Happened In The Bankruptcy Court?

When the Regents filed a document request in *Newby* requesting that the Financial Institutions produce the transcripts of their employees' Examiner interviews, the Financial Institutions did not seek relief in this Court. Instead, they took the unusual step of asking the Bankruptcy Court – where all parties could not be heard – to enter an order preventing the disclosure of these materials in the *Newby* case.

This is surprising, because this Court (and not the United States Bankruptcy Court) is charged with the responsibility to decide what is and what is not discoverable in the *Newby* case. In addition, with the exception of Enron (and the plaintiffs and Financial Institutions who have filed proofs of claim in Enron's bankruptcy), the Bankruptcy Court lacks jurisdiction over the parties in the *Newby* and *Tittle* cases. The Outside Directors and many of the Enron Officer Defendants were unable to appear and advise that court of the very real prejudice that might ensue if an order was entered (as it was) prohibiting disclosure of the Examiner Transcripts in the *Newby* case. The decision of the Bankruptcy Court should not, therefore, be considered a *fait accompli*. Respectfully, a decision of this magnitude should not have been taken without a full airing of the prejudice that would ensue to all affected parties if these transcripts were suppressed – and only this Court had jurisdiction to

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hereto as Exhibit "D"; Financial Institutions Requests For Production to V&E, Requests No. Interrogatory Nos. 1-4 & Request No. 5, attached hereto as Exhibit "E". Thus, the Financial Institutions have themselves asserted that statements to the Examiner are relevant, not privileged, and discoverable.

make that judgment.[8]

The transcript of the bankruptcy hearing also suggests an issue was of concern to Judge Gonzalez that is not relevant here. Specifically, Judge Gonzalez seems to have been influenced by the fact that the Regents had previously agreed to a Bankruptcy Court order stating that their counsel would not be permitted to attend depositions taken by the Examiner. *See* Transcript of Hearing at 24 ("The confidentiality orders that were entered . . . what did you think that was for? . . . If you knew you weren't invited and you knew why you weren't invited, did you then think that once the depositions were taken and the examiner did his report, that there wouldn't be issues raised with respect to your getting access to it?"), Exhibit "B" hereto. Judge Gonzalez may therefore have concluded that by agreeing to the confidentiality order, the effect of that order needed now to be enforced against the Regents. Whether that was the basis for his decision or not, there can be no claim that the Outside Directors – who made no such agreement – waived their right to obtain discovery of the Examiner Transcripts in these consolidated cases.

Finally, although Judge Gonzalez precluded disclosure of the Examiner materials in *Newby*, *see* Exhibit "A," his Order did not prohibit their discovery in other litigation where their use may be advantageous to Enron; namely, in Enron's multi-billion dollar lawsuit against the Financial Institutions or in the Creditors' Committee's action against certain former officers of Enron. Nor does the Order prohibit parties to those cases from: a) obtaining discovery of the Examiner materials in those cases; or, b) sharing transcripts among themselves to their own advantage in those cases.

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[8] It is no answer to suggest that persons not parties to the bankruptcy could have appeared to be heard had they wished to do so. The fundamental premise of jurisdiction is that a court must have the power to act over a party – and the Bankruptcy Court lacked the power to so dramatically alter and affect the rights of persons not parties before it.

See n.4, *supra*. Instead, its effect is limited solely to preventing a handful of parties in *Newby* – among them the Outside Directors – from obtaining this highly relevant information. These circumstances demonstrate that, although this Court should certainly consider Judge Gonzalez's Order carefully, that Order cannot be the final word on whether the Examiner materials should be disclosed in this case.[9]

IV. Why Should The Transcripts Be Produced?

Basic procedural fairness dictates that the transcripts be made available to all parties in *Newby* and *Tittle*. The Examiner has admitted that Enron and the Creditors' Committee already have copies of the transcripts. *See* Motion of Neal Batson at ¶ 12, attached hereto as Exhibit "F." No order prohibits the discovery of the Financial Institution witnesses' transcripts (or other Examiner materials) in the *Enron* and *Creditors' Committee* lawsuits. Order at 2 (prohibiting discovery of witness transcripts only in *Newby*), Exhibit "A" hereto. The fact that only some – but not all – parties to the consolidated actions would have access to the transcripts is antithetical to the Federal Rules of Civil Procedure, which contemplate that all parties will have access to the same universe of non-privileged information (and we emphasize that this is non-privileged information) so as to avoid trials by ambush and surprise. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled

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[9] It is also important to note that Judge Gonzalez's Order does not prohibit production of the Examiner transcripts in the *Tittle* action. *See* Order, Exhibit "A" hereto. Because Enron Corp. is a named defendant in Tittle, at the very least the parties to that action should be granted discovery of the relevant transcripts within Enron's custody and control.